

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KENNETH MCCURDY,

No. C 07-5084 CW (PR)

Petitioner,

v.

ORDER DENYING PETITION FOR WRIT  
OF HABEAS CORPUS; DENYING  
CERTIFICATE OF APPEALABILITY

BEN CURRY, Warden,

Respondent.

\_\_\_\_\_ /

Pro se Petitioner Kenneth McCurdy seeks a writ of habeas corpus under 28 U.S.C. § 2254 challenging the September 7, 2006 decision of the California Board of Parole Hearings (BPH) denying him parole at his eighth parole suitability hearing. Doc. No. 1-1 at 7; Doc. No. 18-3 at 44. Specifically, Petitioner claims that the BPH denied him due process in denying him a parole date by using the "unchanging factors" of his commitment offense, continuing to use outdated information and overlooking current reports submitted by Petitioner. Doc. No. 1-2 at 7; Doc. No. 27.

The United States Supreme Court recently made clear that in the context of a federal habeas challenge to the denial of parole, a

1 prisoner subject to a parole statute similar to California's  
2 receives adequate process when the BPH allows him an opportunity to  
3 be heard and provides him with a statement of the reasons why parole  
4 was denied. Swarthout v. Cooke, No. 10-333, slip op. at 4-5 (U.S.  
5 Jan. 24, 2011). Here, the record shows Petitioner received at least  
6 this amount of process. The Constitution does not require more.  
7 Id. at 5.

8 The Court also made clear that whether the BPH's decision was  
9 supported by some evidence of current dangerousness is irrelevant in  
10 federal habeas: "it is no federal concern . . . whether  
11 California's 'some evidence' rule of judicial review (a procedure  
12 beyond what the Constitution demands) was correctly applied."  
13 Swarthout v. Cooke, slip op. at 6.


14 Accordingly, the instant federal Petition for a Writ of Habeas  
15 corpus is DENIED.

16 Further, a Certificate of Appealability is DENIED. See Rule  
17 11(a) of the Rules Governing Section 2254 Cases. Petitioner has not  
18 made "a substantial showing of the denial of a constitutional  
19 right." 28 U.S.C. § 2253(c)(2). Nor has Petitioner demonstrated  
20 that "reasonable jurists would find the district court's assessment  
21 of the constitutional claims debatable or wrong." Slack v.  
22 McDaniel, 529 U.S. 473, 484 (2000). Petitioner may not appeal the  
23 denial of a Certificate of Appealability in this Court but may seek  
24 a certificate from the Court of Appeals under Rule 22 of the Federal  
25 Rules of Appellate Procedure. See Rule 11(a) of the Rules Governing  
26 Section 2254 Cases.

1       The Clerk shall terminate any pending motions as moot, enter  
2 judgment in favor of Respondent and close the file.

3  
4       IT IS SO ORDERED.

5  
6 Dated: 2/7/2011

  
CLAUDIA WILKEN  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

KENNETH DONALD MCCURDY,

Plaintiff,

v.

BEN CURRY et al,

Defendant.

Case Number: CV07-05084 CW

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on February 7, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Kenneth Donald McCurdy C-76230  
H-342-L  
P.O. Box 2000  
Vacaville, CA 95696-2000

Dated: February 7, 2011

Richard W. Wieking, Clerk  
By: Nikki Riley, Deputy Clerk